

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	CASE NO. 05-CV-329-GKF-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR EXTENSION OF EXPERT
WITNESS REPORT DISCLOSURE DEADLINE [DKT # 1702]**

Defendants submit this joint Response in opposition to Plaintiff's Motion for Extension of the Expert Witness Disclosure Deadline (Dkt #1702). For at least the fourth time, Plaintiff urges that the Court change some aspect of its expert reporting deadlines in the current Amended Scheduling Order. On the previous requests for extensions, the Court has refused to extend the deadline for the Plaintiff's expert reports any further with one minor exception, and the Court should again decline this latest iteration of the Plaintiff's request because: 1) the Motion merely essentially restates that which has been requested before and denied by this Court; 2) the extension requested would prejudice the Defendants in the preparation of their own expert case; 3) the Plaintiffs only six days ago successfully argued to this Court for a delay of Defendants' ability to take properly noticed Rule 30(b)(6) depositions of the State on the basis that their expert reports are due on May 15, 2008; and 4) the Motion seeking the extension is unwarranted and untimely.

I. Procedural Background

Unable to reach agreement on a pretrial schedule, the parties submitted competing proposals to the Court in January, 2007. In their submission, the Plaintiff proposed language routinely employed by Magistrate Judge Joyner for expert reports "on injury and causation and all other issues except for damages" and for "damages." (Dkt. # 1026 at 1) The Scheduling Order, which adopted the Plaintiff's requested expert report descriptions, issued on March 9, 2007 and provided that the Plaintiff's expert reports were due to be issued and provided to the Defendants by no later than December 3, 2007. (Dkt. # 1075)

In September, 2007 the Defendants moved to extend and modify the dates in the Scheduling Order. (Dkt. # 1297) Prior to the Defendants' motion, the Plaintiff had rejected all proposals to modify the schedule. In their Response to the Defendants' motion, however, the Plaintiff sought an eight-month schedule extension on several deadlines, not just those relating to experts. (Dkt. # 1322 at 1) The Court treated the Plaintiff's Response as a motion to amend. (Order of Nov. 15, 2007: Dkt. # 1376 at 1-2.)

The Court heard oral argument on the motions on November 6, 2007. On November 15, 2007, Magistrate Judge Joyner issued an Amended Scheduling Order. (Dkt. # 1376) In the Amended Scheduling Order the Court set the expert report deadline for the Plaintiff at April 1, 2008. The Plaintiff did not file any objection to the November 15, 2007 Amended Scheduling Order prior to the November 26, 2007 deadline for such objections. *See Fed. R. Civ. P. 72(a)* (providing party may file objections to magistrate judge's order within 10 days after being served with the order).

Instead, on December 3, 2007, the Plaintiff untimely moved for reconsideration of the November 15, 2007 Amended Scheduling Order. (Dkt. # 1386) Despite the fact that every

argument that the Plaintiff raised in this reconsideration motion (including the expert report debate) either had been raised or could have been raised in the initial briefing, Magistrate Judge Joyner conducted a full analysis of the Plaintiff's motion. (Order of Jan. 15, 2008: Dkt. # 1459 at 2) In discussing the expert report deadline for the Plaintiff, Magistrate Judge Joyner stated that "[t]his case was filed June 13, 2005. State's experts should be ready to fully opine on all issues of causation and issues of remediation and affirmative relief by the current deadline of April 1, 2008 for the Plaintiff." *Id.*

On January 25, 2008 the Plaintiff filed its "Objection to the Amended Scheduling Order." (Dkt. # 1470) The Court denied this Objection by Order dated March 14, 2008. (Dkt # 1630) The Plaintiff next filed its Motion for Extension of Time to Comply with Certain Requirements of the Amended Scheduling Order. (Dkt # 1618). In this Motion, the Plaintiff sought a four month delay in producing its expert reports, until August 1, 2008. Following a telephonic hearing held before Magistrate Judge Joyner on March 26, 2008 Magistrate Judge Joyner found that because of a delay in obtaining certain information regarding bird counts from the Defendants in discovery, the Plaintiff had established good cause for a brief extension of the deadline. While Magistrate Judge Joyner expressly observed that a four month delay was unwarranted, he did ultimately extend the deadline by 45 days to May 15, 2008. (Order of March 27, 2008: Dkt # 1658) Since then, the schedule has remained unchanged.

On April 14, 2008 the Defendants served Notices of Deposition upon the State for the production of representatives pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure who are knowledgeable on certain topics identified in the Notice, said depositions to take place in Oklahoma City beginning on April 28, 2008. (Dkt # 1687-3) In correspondence following service of the Notice, the Plaintiff asserted that it would only be willing to schedule such

depositions on dates after the May 15, 2008 expert report deadline set in the last Amended Scheduling Order of March 27, 2008. (Dkt # 1687-4 at 2) When the Defendants would not agree that the deadline for expert reports stays discovery in the case, the Plaintiff refused to appear for the Noticed date, and on April 25, 2008 filed a Motion for Protective Order and Motion to Quash Deposition Notice. (Dkt # 1687). The Motion by the Plaintiff asserted that the Plaintiff was “fully engaged in preparing expert reports in this matter.” (*Id.* at 1) The Plaintiff further stated that the “State’s expert reports are now due on May 15, 2008. The State is continuing to work on preparing and producing its expert reports to meet the May 15, 2008 deadline.” (*Id.* at 3) The Plaintiff asserted that if they were required to produce Rule 30(b)(6) representatives for deposition on the noticed topics before May 15, 2008 it would be “likely to disrupt the preparation of the State’s expert reports.” (*Id.* at 4)

A hearing was held on the Plaintiff’s Motion for Protective Order and Motion to Quash Deposition Notice before Magistrate Judge Sam Joyner on May 6, 2008 – just six days before the Plaintiff filed the instant motion. At the hearing, the Plaintiff repeatedly stated on the record their intention that their expert reports would be submitted on the May 15, 2008 deadline, thus necessitating, in the Plaintiff’s view, the need to delay the taking of Rule 30(b)(6) depositions until a date after May 15, 2008. Based on these arguments, Magistrate Judge Joyner found the grounds for Plaintiff’s Motions lacking on the record (in an order yet to be filed in written form), and directed that the depositions had to be scheduled by May 23, 2008, the practical effect of which was to relieve the Plaintiff of the supposed burden of engaging in discovery while simultaneously completing its expert reports.

II. Argument

The setting of deadlines in a Scheduling Order is subject to this Court's discretion. The Court should remain firm with the deadlines in the case at this stage, or else other deadlines will have to be moved and the domino effect will render the Scheduling Order meaningless, and the course of the case will lack the necessary predictability for proper preparation and fairness for both sides.

A. The Request Should be Denied Because Similar Ones Have Already Been Ruled Upon.

As the Court is probably well aware, the Plaintiff does not like the current deadline for expert reports. Beginning in September, 2007 the Plaintiff has repeatedly sought to change this particular deadline. The Court has likewise mostly refused to change the deadline except in limited instances, where the Court found there had been a delay in the production to the Plaintiffs of some information which the Court found was under the control of the Defendants. In that type of instance, among repeated requests to move this deadline, the Court denied the Plaintiff's request for a 4 month extension and instead ruled that a 45 day extension was appropriate. (Dkt # 1658)

Now the State has come forward with what can only be described as a dubious set of concurrent "emergencies" to try to take yet one more bite at this particular apple. It lacks credibility to accept that a group of professional testifiers who have worked on this case as experts for several years failed to plan for contingencies so that their reports could be completed to meet a Court-ordered deadline. It requires the suspension of disbelief to merely accept that some of these same professionals would ask this Court to extend the deadlines because of the occurrence of the very predictable spring rites on a college campus where each has worked for several years. The Defendants are unaware of any plausible set of circumstances where a party retains a college professor to serve as a testifying expert and then argues that exigent paper grading and long-

scheduled graduation ceremonies form an appropriate rationale for disregarding a long-established court deadline for producing their expert reports.

This Court has indicated on several occasions, as outlined hereinabove, that the deadlines in its Scheduling Order for expert reports are firm. Magistrate judges are given "wide latitude" in setting schedules. *See Burks v. Okla. Publ. Co.*, 81 F.3d 975 (10th Cir. 1996) The spirit, intent and purpose of scheduling orders is designed to allow courts to actively manage the preparation of cases for trial. *Olcott v. Delaware Flood Co.*, 76 F.3d 1538 (10th Cir. 1996). The district court has discretion to include matters in its pretrial order that will insure early judicial intervention in the process of trial preparation and proper conduct of the entire process. *Matter of Sanction of Baker*, 744 F.2d 1438 (10th Cir.1984). The control of whether to extend deadlines is strictly a matter of court discretion. *Rodriguez v. IBP, Inc.*, 243 F.3d 1221 (10th Cir. 2001); *Smith v. United States*, 834 F.2d 166, 169 (10th Cir. 1987). Hence, even where a party makes a necessary showing of good cause to modify dates within a pretrial schedule, the decision on modification of the schedule is left to the Magistrate Judge's discretion. *Fed. R. Civ. P.* 16(b)(4).

The Defendants would submit that a power failure and paper grading and graduation ceremonies are insufficient to demonstrate good cause to change the current expert deadlines in this case. This seems to simply be another attempt by the Plaintiff to manipulate the Court into altering the established schedule to one that is more to the Plaintiff's liking. The Court should once more deny the Plaintiff's efforts in this regard.

B. The Court Should Deny the Request Because of Prejudice to Defendants

The very reason that courts establish scheduling orders, particularly in complex litigation, is to provide the parties with predictability in preparing the case for trial. The Federal Rules of

Civil Procedure generally require entry of a scheduling order covering time limits for the completion of major events during the course of a civil action. *See Fed.R.Civ.P.* 16(b).

Scheduling orders are not to be modified by the trial court except when authorized by local rule and upon a showing of good cause. *Fed.R.Civ.P.* 16(f); *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507 (10th Cir. 1990). Scheduling orders should be modified only to prevent manifest injustice. *Burnette v. Dresser Industries, Inc.*, 849 F.2d 1277 (10th Cir. 1988).

In the present situation, changing the scheduling order related to experts at this late date would actually cause a manifest injustice and prejudice to the Defendants, as opposed to preventing one for the Plaintiff. The Plaintiff seeks this extension on only three days' notice. The Plaintiff wants additional time to prepare its own expert reports without the Defendants being provided any extra time to respond. The Plaintiff still anticipates that the Defendants would get only 90 days from receipt of the State's expert reports (whenever that may be). Thus, the effect of the Plaintiff's motion would essentially be that it would now get three full years from the filing of the lawsuit to prepare its expert case, including additional time due to entirely avoidable problems cited in the instant affidavits, and the Defendants would still get only 90 days to prepare their responsive expert case. Whether the 90 days runs from May 15th for one expert or June 1st for another is almost immaterial, as it is still only 90 days. To quote the Magistrate Judge on a previous ruling on this subject matter, "State's experts should be ready to fully opine on all issues of causation and issues of remediation and affirmative relief by the current deadline. . . ." (Dkt #1459)

The Plaintiff's "offer" of extension to the Defendants (although it is still effectively only 90 days of preparation time for the defense) is also flawed in that it presupposes that the Defendants' experts will be so designated as to match up perfectly with the Plaintiff's experts, so

that it would be a simple matter to extend the Defendants' deadline for only those defense experts who are directly rebutting the same subject matters as the State's experts who claim to need emergency relief from the current Scheduling Order. Likewise, it appears from Plaintiff's expert affidavits submitted in support of its Motion for Protective Order that several of its experts rely on the work of other experts in forming their opinions. Thus, given the inter-dependent nature of the Plaintiff's experts' work, it is both inappropriate and unrealistic for the Plaintiff to assert that its late expert reports can be easily and directly addressed by specific individual rebuttal experts retained by the Defendants. Thus, such an extension would not be a simple or manageable matter. Accordingly, if the Court was to grant the Plaintiff's Motion, the Defendants are likely to suffer prejudice unless all of the Defendants' expert report deadlines are also extended to provide a full three months to respond after the last of the Plaintiff's reports are served.

Additionally, anticipating that the Plaintiff's expert reports were forthcoming on May 15, 2008, counsel for the Defendants have already scheduled their own meetings to begin reviewing the reports from the State together to begin to determine what will be required to meet their own deadlines for expert reports. These meetings are scheduled to take place before the Plaintiff's newly proposed deadline, and it has been scheduled at a substantial cost to the Defendants. Counsel have made travel arrangements based on the current schedule – arrangements which cannot be altered at this late date.

The Defendants would submit that there is a likelihood of substantial prejudice to the defense if the motion by the Plaintiff was granted. This prejudice would be incurred without any corresponding good cause shown by the State. "Cause" is not equivalent to "good cause", and it is clear that the issues cited by the Plaintiff are things that could have been avoided or are issues

that are not real issues that ought to be considered by this Court insofar as it relates to modifying the scheduling order and the expert deadlines contained therein. Certainly, the prejudice to the defense in a last minute change to the deadlines far outweighs any problems for the Plaintiff in adhering to the current schedule.

C. The Court Should Deny the Request Because it is Unwarranted and Untimely

If the new deadline was really so critical to Plaintiff's ability to fairly present its case, Plaintiff logically would have sought this relief on the cited basis sooner than a scant three days before the expert reports were due. The Plaintiff offers no sustainable reason to overturn Magistrate Judge Joyner's discretionary decisions for the scheduling of expert reports just as Plaintiff's deadline is approaching.

This is particularly true given what has happened most recently. On April 14, 2008 the Defendants served Rule 30(b)(6) Notices of Deposition upon the Plaintiff. The Plaintiff maintained that it would only be willing to schedule such depositions on dates after the May 15, 2008 expert report deadline, and on April 25, 2008 filed a Motion for Protective Order and Motion to Quash Deposition Notice. (Dkt # 1687). The Motion by the Plaintiff asserted that the Plaintiff was "fully engaged in preparing expert reports in this matter." (*Id.* at 1) The Plaintiff further stated that the "State's expert reports are now due on May 15, 2008. The State is continuing to work on preparing and producing its expert reports to meet the May 15, 2008 deadline." (*Id.* at 3) The Plaintiff asserted that if it was required to produce Rule 30(b)(6) representatives for deposition on the noticed topics before May 15, 2008 it would be "likely to disrupt the preparation of the State's expert reports." (*Id.* at 4)

A hearing was held on the Plaintiff's Motion for Protective Order and Motion to Quash Deposition Notice before Magistrate Judge Sam Joyner on May 6, 2008 – a mere six days before the Plaintiff filed the instant motion. At the hearing, the Plaintiff repeatedly stated on the record its intention that its expert reports would be submitted on the May 15, 2008 deadline, thus necessitating, in the Plaintiff's view, the need to delay the taking of Rule 30(b)(6) depositions until a date after May 15, 2008. Not one time in the pleadings or at the hearing before the Magistrate last week did anyone representing the Plaintiff make any reference to the fact that the Plaintiff was apparently in the process of preparing affidavits for various State experts to execute in support of the instant motion, or indicate that it might be necessary to file the instant motion, or otherwise indicate to the Court or to the Defendants that the Plaintiff would be seeking an extension of the very expert reporting deadline it was then claiming it would meet. This is presumably because it would have been an inconvenience to the Plaintiff to bring up the issue in that context, given that it was then using the current deadline as a justification for rescheduling the Rule 30(b)(6) depositions of the State which the Defendants had properly noticed. In that context, the Plaintiff presumably needed the date to be May 15, 2008 so that it could claim how pressing the deadline was and how burdensome it would be to simultaneously engage in routine discovery.

Now that the Plaintiff has disposed of that issue and pushed those depositions off, it comes to the Court also seeking to push that very same expert reporting deadline off, as well. This is certainly an issue that could have been raised (or mentioned) before the Magistrate last week, and may well have factored into whether the discovery being sought really needed to be postponed. The Plaintiff seems to have plenty of time to file motions to prevent discovery and to

prepare multiple affidavits to support yet another request for extension of the expert reporting deadline, while claiming that it needs more time to put its expert case together.

Defendants urge this Court to deny the Plaintiff's motion for the reason that it is unwarranted and untimely, and require the Plaintiff to abide by this Court's current Amended Scheduling Order limiting the Plaintiff to the 1065 days since the filing of the case that it has already had to prepare its expert case.

III. Conclusion

The Defendants urge the Court to deny Plaintiff's Motion for Extension of the Expert Witness Disclosure Deadline (Dkt #1702) as repetitive of previous motions, as lacking in good cause, as prejudicial to the defense, and as unwarranted and untimely.

WHEREFORE, PREMISES CONSIDERED, Defendants request that this Court deny Plaintiff's Motion for Extension of the Expert Witness Disclosure Deadline, and for any and all other relief to which they may be justly entitled.

BY: /s/ James M. Graves

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